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Before the  
Federal Communications Commission  
Washington, D.C. 20554

APR 23 1997

Federal Communications Commission  
Office of Secretary

In the Matter of

Implementation of Section 402(b)(1)(A)  
of the Telecommunications Act of 1996

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CC Docket No. 96-187

**REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY**

Pursuant to Section 1.429 of the Commission's rules, Southwestern Bell Telephone Company (SWBT) hereby replies to the Oppositions filed against SWBT's Petition for Reconsideration.<sup>1</sup>

**I. THE OPPOSITIONS PROVIDE NO BASIS TO RETAIN SECTION 208 REVIEW OF STREAMLINED TARIFF FILINGS.**

**A. Sprint's Opposition Supports the Basis for SWBT's Position.**

Sprint argues that the Commission's finding that "'deemed lawful' clearly establishes a conclusive presumption of lawfulness is contradicted by the fact that the Commission still reserves the right to find any streamlined tariff of a LEC [local exchange carrier] unlawful in a subsequent Section 205 investigation or Section 208 complaint proceeding."<sup>2</sup> In making this point, Sprint implicitly supports SWBT's position.

SWBT has also noted that the Commission's finding that "deemed lawful" equates to a "conclusive presumption of lawfulness" is inconsistent with the ability of a complainant to

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<sup>1</sup> Oppositions were filed by AT&T Corp. (AT&T); Sprint Corporation (Sprint); MCI Telecommunications Corporation (MCI); Competitive Telecommunications Association (CompTel); Hyperion Telecommunications, Inc.; KMC Telecom, Inc.; and McLeod USA Telecommunications Services, Inc. (Hyperion, KMC and McLeod are collectively referred to here as the Joint Commentors); World Com, Inc. (WorldCom); and the Telecommunications Resellers Association (TRA).

<sup>2</sup> Sprint at p. 3. TRA is also in accord. TRA at pp. 9-10.

recover damages in a subsequent Section 208 complaint.<sup>3</sup> Thus, SWBT filed its petition to eliminate this inconsistency by asking the Commission to declare that such complaints would not be proper.

Sprint would have it the other way: To clarify the inconsistency, Sprint wants the Commission to find that only “a rebuttable presumption of lawfulness” is intended, which can be defeated in a complaint proceeding. The Commission, however, was correct in its finding of a conclusive presumption. Sprint’s attack<sup>4</sup> on the cases cited by the Commission in the Report and Order is unconvincing.

Sprint claims that the basis for the decision in Municipal Resale Service Customers and Ohio Power Company is that there was a need to accommodate “the division of responsibilities in the regulation of energy prices between FERC and the SEC.”<sup>5</sup> Sprint fails to address the similar need in the scope of tariff regulation, that is, the need to divide responsibilities appropriately between pre-effective tariff review and post-effective tariff review. In light of the Congressional objectives, the Commission properly chose pre-effective tariff review as the means by which to address questions of lawfulness, eliminating, for the most part, post-effective tariff review. As Sprint notes,<sup>6</sup> there is a “Congressional mandate upon the Commission to ‘speed up implementation of LEC tariffs.’” By eliminating most forms of post-effective tariff review, the Commission most appropriately complies with this Congressional intent.

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<sup>3</sup> SWBT Petition at p. 2.

<sup>4</sup> Sprint at pp. 3-4.

<sup>5</sup> Sprint at p. 4.

<sup>6</sup> Sprint at p. 5.

Sprint argues that “parties are still able to rebut [the] presumption [of lawfulness] in a subsequent Section 208 complaint and, if successful, seek damages as provided for under Section 207.”<sup>7</sup> As SWBT noted in its petition, however, if the Commission’s presumption is truly “conclusive,” it cannot be “rebutted” in a Section 208 complaint proceeding.

Sprint suggests that the use of the term “streamlined” in Section 204(a)(3) strongly suggests that Congress wanted the nondominant carrier tariff review regime to apply to certain LEC tariff filings.<sup>8</sup> SWBT does not disagree that allowing all carriers to make tariff filings on one day’s notice would be the most appropriate implementation of Section 204(a)(3). Nevertheless, this argument provides no support for Sprint’s position that LEC streamlined tariffs should not be immune from Section 208 attack.

The fact that the Commission has allowed for pre-effective tariff review eliminates the need for any sort of post-effective review, especially review through Section 208 complaints. Sprint claims that it is inconsistent for the Commission to allow the damages remedy for the streamlined tariffs of nondominant carriers, but not for the streamlined tariffs of dominant LECs.<sup>9</sup> Sprint would apparently have the Commission believe that the damages remedy is well-used against the streamlined tariffs of nondominant carriers. SWBT, however, is unable to find any instance where the Commission awarded damages to a complainant that prevailed in finding a nondominant carrier tariff filing unlawful.

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<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Sprint at p. 6, footnote 2.

In any event, nondominant LECs have the choice of filing tariffs under 204(a)(3) if they wish to have damages immunity. Without regulatory parity for ILECs, however, it would be unreasonable to grant damages immunity to unsupported one-day tariff filings.

B. The Other Oppositions Provide No Grounds to Reject SWBT's Arguments.

MCI's arguments opposing SWBT's Petition are likewise unconvincing. MCI claims that SWBT "provides no reasons for its view that 'deemed lawful' should be interpreted to preclude all Section 208 remedies."<sup>10</sup> On the contrary, SWBT has noted that "any other result makes the finding of lawfulness accorded by the statute a virtual nullity."<sup>11</sup> SWBT has also shown that the status afforded to LEC streamlined tariffs by the statute is inconsistent with the availability of a Section 208 complaint. Thus, administrative convenience alone dictates that the Commission should declare all such complaints to be unfounded now rather than dismissing each such complaint on a case-by-case basis in the future. Eliminating such double review is totally consistent with the Congressional mandate to streamline such tariff filings.

MCI claims that SWBT implicitly concedes that "deemed lawful" is ambiguous.<sup>12</sup> On the contrary, SWBT does not concede that "deemed lawful" is ambiguous in the context in which the statute uses it. The Commission's Report and Order itself noted that "deemed" is not

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<sup>10</sup> MCI at p. 2. See also, Joint Commentors at pp. 2-4.

<sup>11</sup> SWBT Petition at p. 2.

<sup>12</sup> MCI at p. 4.

ambiguous in the context of the statute.<sup>13</sup> MCI asks “the Commission to review such considerations as statutory context,”<sup>14</sup> but clearly the Commission has already done so.

MCI claims that SWBT’s view would “preclude Section 208 complaints against LECs in virtually all cases.”<sup>15</sup> MCI apparently presumes that all LEC tariff filings will be accomplished on a streamlined basis. On the contrary, the Report and Order explicitly notes that some tariff filings will not be streamlined, and thus the traditional Section 208 complaint regime will still apply to certain filings. Therefore, the Commission has not “upset a century of administrative law.”

AT&T similarly argues that Section 402(b)(1)(A) should only be read in the narrow context of AT&T’s view of the “century of settled law.”<sup>16</sup> AT&T’s argument ignores today’s rapid changes in the law and the industry. In AT&T’s view, “customers have the right to seek reparations for overcharges unless the relevant agency makes an affirmative finding that a rate is reasonable.”<sup>17</sup> In practice, however, AT&T must admit that the Commission has already essentially eliminated this “right” in virtually all cases for nondominant carrier tariffs. As SWBT noted previously, it cannot find any instance where a nondominant carrier has been ordered to pay damages due to a Commission finding that a nondominant tariff rate was unreasonable. Thus, the Commission has already, in effect, eliminated this so-called “right” for

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<sup>13</sup> Report and Order at p. 19 (emphasis added).

<sup>14</sup> MCI at p. 4 (emphasis added).

<sup>15</sup> Id.

<sup>16</sup> AT&T at p. 3. See also WorldCom at pp. 3-6.

<sup>17</sup> AT&T at p. 2.

nondominant carrier tariffs, and is justified in affording some similar treatment to LEC tariffs generally.

Likewise, the claim of WorldCom<sup>18</sup> that the Commission's interpretation of "deemed lawful" is too "extreme" is a claim made too late. If WorldCom wished to truly maintain the protections of the Communications Act for consumers which WorldCom claims are inherent in the statutory scheme, it would have to agree that the Commission's establishment of the dominant/non-dominant scheme is unlawful. The precedent for the virtual elimination of post-effective tariff review has been set in those proceedings and in the Commission's subsequent elimination of any pre-effective review (by allowing one-day notice filings) for nondominant carrier tariffs. These proceedings merely extend some of those same benefits to all LECs.

To attempt to bolster its position, AT&T also misinterprets SWBT's Comments. AT&T claims that SWBT's petition asserts that a Section 205 proceeding is available, but that "SWBT stated in its comments that such a [Section 205] proceeding would be an 'inconceivable circumstance.'"<sup>19</sup> SWBT in no way claimed in its Comments that Commission action under Section 205 was an "inconceivable circumstance." Instead, in context, SWBT's Comments read as follows:

Only in the inconceivable circumstance where the Commission in a Section 205 proceeding finds that its prior "determination" should be reversed, and the LEC with the challenged tariff has not subsequently complied with the result of the Section 205 proceeding, could a complainant legitimately have precedent to carry its burden of showing that the tariff is unlawful.<sup>20</sup>

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<sup>18</sup> WorldCom at pp. 5-6. See also CompTel at pp. 4-5, TRA at pp. 6-8.

<sup>19</sup> AT&T at p. 3, footnote 5.

<sup>20</sup> SWBT's Comments at p. 4.

As is obvious from reading the passage above, the “inconceivable circumstance” is if the Commission acts under 205, and the LEC does not subsequently take action to conform its tariff to the result of that proceeding. AT&T’s attempt to misstate SWBT’s Comments underscores the weakness of AT&T’s position.

AT&T claims that “[a]ll other tariffs filed under the Communications Act or kindred statutes continue to be subject to claims for reparations, unless the agency overseeing them makes an affirmative finding that they are reasonable.”<sup>21</sup> Again, the lack of any FCC history that supports this claim in regard to nondominant carrier tariffs reveals its illusory nature. AT&T claims that “SWBT seeks to remove its tariff filings from all review.” AT&T, however, can only make such a claim if it ignores the pre-effective review that the tariffs must pass (as well as the potential for Section 205 proceedings).

The Joint Commentors claim that SWBT’s position would “eviscerate customer remedies for a LEC’s unlawful tariffs.”<sup>22</sup> The key problem with Joint Commentors’ argument is that Congress has mandated that the tariffs which the Commission allows to take effect will be “deemed lawful.” Thus, there will not be any “unlawful tariffs” to be remedied.

## **II. THE PROTECTIVE ORDER MUST BE MODIFIED OR MADE UNNECESSARY.**

AT&T and MCI attack SWBT’s Petition for Reconsideration of the Report and Order’s imposition of a standard protective order which is insufficient to protect SWBT’s confidentiality rights. AT&T claims that SWBT has no legally cognizable “right” for confidentiality in its

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<sup>21</sup> AT&T at p. 4.

<sup>22</sup> Joint Commentors at p. 5. See also WorldCom at pp. 6-7.

supporting materials. AT&T thus sidesteps any meaningful discussion regarding the history of the exemptions to the Freedom of Information Act or the Trade Secrets Act which in fact provide just such rights to SWBT. Indeed, AT&T itself has asserted that Section 552(b)(4) of the Freedom of Information Act and Section 0.459 of the Commission's rules require that confidential data requested by staff in review of a tariff transmittal be held from public review.<sup>23</sup>

In the past (when AT&T was required from time to time to file confidential information with the Commission) AT&T also raised concerns regarding the amount of copying that should be allowed of such confidential information.<sup>24</sup> Certainly SWBT should be allowed to assert its concerns in this proceeding over the confidentiality of the supporting materials, and any copies that are made.

MCI claims that the standard protective order adequately protects the LEC's confidentiality interests. Nevertheless, as SWBT has referenced in this docket, there have been documented instances where protective agreements and orders have been insufficient to prevent improper disclosure.<sup>25</sup>

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<sup>23</sup> AT&T Communications Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 3380, 3557, 3542 and 3543, 7 FCC Rcd 156 (Com. Car. Bur. 1991), at fn. 4.

<sup>24</sup> See, e.g., MCI Telecommunications Corporation; on request for inspection of records and AT&T Company; request to modify Protective Order, FOIA Control No. 84-144, 58 Rad. Reg. 2d(P&F) 648 (1985) at para. 2. (In this matter, MCI agreed with AT&T that the Protective Order between them should restrict the number of copies that could be made under the terms of that protective agreement.)

<sup>25</sup> SWBT Comments, p. 19, citing Brief of SBC Communications Inc. filed June 14, 1996 in GC Docket No. 96-55, In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, pp. 6-7.

TRA claims that there is a “right of the public” to comment on tariff filings which is infringed by the protective order.<sup>26</sup> On the contrary, there is no such right, and TRA does not provide any support for its claim. Even if such a right existed, TRA would have to admit that the “right” has already been eliminated for tariff filings allowed to be made on one-day’s notice.

As SWBT stated in its Petition, the Commission should make protective orders unnecessary for the reasons described in SWBT’s Comments by eliminating cost support requirements.<sup>27</sup> At a minimum, the Commission should adopt procedures that allow LECs to file streamlined tariff changes without requiring them to compromise complete confidentiality of their sensitive information.

MCI also avers starkly that the standard protective order is sufficient to protect SWBT’s vendors’ competitive interests.<sup>28</sup> MCI provides no basis for this position.

### **III. NEITHER MCI NOR AT&T PROVIDE ANY FURTHER BASIS FOR DILUTING THE INTENT OF SECTION 402(b)(1)(A).**

AT&T and MCI (but not Sprint) oppose SWBT’s petition to discontinue the filing of the tariff review plan (TRP) 90 days prior to July 1 of each year. As SWBT noted, the early filing of TRPs dilutes the intent of 402(b)(1)(A). Under the logic used by AT&T and MCI, the Commission would apparently be justified in requiring the filing of almost any supporting information for a tariff at virtually any time prior to the filing of that tariff, so long as the explicit rates of that tariff filing are not revealed. By failing to admit that the statutory language restricts

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<sup>26</sup> TRA at p. 12.

<sup>27</sup> See also, SBC’s Comments in GC Docket No. 96-55.

<sup>28</sup> MCI at p. 7.


the Commission's authority to require pre-tariff filing disclosures, MCI and AT&T ignore the plain language of the statute.

**IV. CONCLUSION.**

For the foregoing reasons, SWBT respectfully requests that the Commission revise its Report and Order consistent with SWBT's Petition for Reconsideration.

Respectfully submitted,

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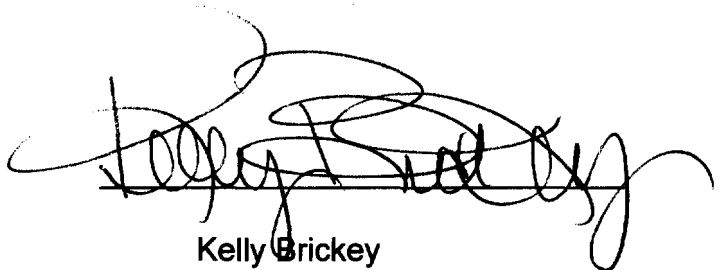
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**CERTIFICATE OF SERVICE**

I, Kelly Brickey, hereby certify that the foregoing " Reply of Southwestern Bell Telephone Company", has been served April 23, 1997, to the Parties of Record.



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